

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MILLERCOORS, LLC,)	
)	
Plaintiff,)	
v.)	Case No. 19-cv-218-WMC
)	
ANHEUSER-BUSCH COMPANIES, LLC,)	
)	
Defendant.)	

Anheuser-Busch Companies, LLC's Motion to for Leave to File a Counterclaim and Amended Answer to First Amended Complaint for Injunctive and Other Relief

Anheuser-Busch Companies, LLC ("AB") requests leave to file an Amended Answer and a Counterclaim. The purpose of the amendment is to address new information that AB has recently learned. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In light of this new information, AB seeks leave to bring a Counterclaim and amend paragraphs 4, 7-8, 11, 33-35 of its Answer and paragraph 2 of its Affirmative Defenses.¹ In support of this motion, AB states:

¹ AB has also amended paragraphs 113-120 of its answer and deleted paragraphs 11-14 of its Affirmative Defenses as those relate to MillerCoors's claim for trademark dilution which has been dismissed.

1. Under Federal Rule of Civil Procedure 15(a)(2), leave to amend should be freely given. No circumstance that may warrant denial of leave applies here. *E.g., Johnson v. Cypress Hill*, 641 F.3d 867, 871-72 (7th Cir. 2011) (“district courts have broad discretion to deny leave to amend where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile”).

2. The proposed Counterclaim is authorized under Federal Rules of Civil Procedure 13 and 20. It is a claim by AB, the defendant, against MillerCoors, the plaintiff. The claims were not known to AB at the time it filed its responsive pleading, but the claims do arise out of the occurrences that are the subject of MillerCoors’s complaint.

3. [REDACTED]

[REDACTED]

4. AB has acted without delay. The motion is based on documents and testimony that AB has obtained since filing its initial Answer to MillerCoors’s Amended Complaint, including information developed in the past two weeks. Critical information for the Counterclaim was obtained in an October 16, 2019 deposition of Robert A. Taylor, Senior Director of Global Brewing Governance for Molson Coors. [REDACTED]

[REDACTED]

[REDACTED]

5. The initial indication of the potential factual basis for the Counterclaim emerged when AB located within MillerCoors's production the document bates-labeled MC 25396. This document was produced September 24, 2019. This document contains photographic images of AB's secret recipes for Bud Light and Michelob Ultra from February 2019. Prior to this discovery, AB was not aware that MillerCoors had obtained its trade secrets. [REDACTED]

[REDACTED]

6. Other key depositions supporting the amendment and Counterclaim are those of Mr. Manuele (taken September 26); MillerCoors's retained expert Dr. John White (taken September 27); and Peter Marino, Chief Communications Officer for MillerCoors (taken September 30). These depositions were scheduled and taken at the first available dates following initial document production.

7. AB does not seek an amendment to the trial date or dispositive motion date.

I. Motion for Leave to Assert Counterclaims

8. The factual basis for the Counterclaim is set forth in the attached exhibit setting out the claims that AB proposes to bring. A shorter summary is as follows:

9. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

10. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

11.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

12.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

13.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

14. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

15. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The information included the exact hops blend used;

² [REDACTED]

the exact barley blend; the ratio of rice to barley; the respective weights of each ingredient; and the volume of the batch. Mr. Edgar obtained additional information about AB's beers and brewing processes in the days after the Super Bowl.

16. [REDACTED]

[REDACTED]

17. [REDACTED]

[REDACTED] Mr. Brooks is the Vice President of Global Quality and Food Safety for Molson Coors. He is a former employee of Anheuser-Busch InBev who, [REDACTED]

[REDACTED]

[REDACTED] Mr. Brooks also had a signed confidentiality agreement that extended after his employment ended. Most, if not all, of the information in the Technical Manuals was still current as of February 2019.

18. These Technical Manuals were developed at great expense; describe precisely how to brew AB beers in all respects; are labeled confidential; are "limited access" documents within AB; and essentially contain all the information needed to brew AB's beers. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

19. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

20. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

21. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

22. For these reasons, AB seeks leave to file a Counterclaim, as outlined in the attached proposed filing, to protect and seek remedies related to the misappropriation and use of its trade secrets.

II. Motion to Amend Affirmative Defenses

23. This case challenges AB's public statements and advertising about beer ingredients. AB has pled an unclean hands affirmative defense. Discovery has revealed evidentiary support for this defense that AB seeks to add to its answer.³

A. [REDACTED]

24. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³ Under Federal Rule of Civil Procedure 8, if this defense is viewed by the Court as more properly a counterclaim for false advertising, it can be re-designated as such. See Fed. R. Civ. P. 8(c)(2) ("If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so."); Nestle Purina Petcare v. Blue Buffalo, 2016 WL 4272241 (E.D. Mo. 2016) (holding that unclean hands defense could not be asserted based upon plaintiff's own alleged false ads, but that defendant would be allowed to amend counterclaims to plead those issues).

[REDACTED]

[REDACTED]

25. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

26. [REDACTED]

[REDACTED]

B. [REDACTED]

27. On February 6, 2019, Mr. Marino published a tweet stating that the Bud Light King John Barley IV (and therefore Bud Light) was “devious” because Bud Light used corn syrup in Bud Light Lime and Orange. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

28. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

29. [REDACTED]

MillerCoors's Code of Conduct states with regard to the use of social media, "BE ACCURATE. Use good judgment and strive for accuracy. Cite sources when possible and correct errors ASAP by posting a retraction." Harrison Dec., Ex. 15, p. 23.

C. [REDACTED]

30. MillerCoors advertises that "not a single product here at MillerCoors ever uses high fructose corn syrup, while a number of Anheuser-Busch products do." ECF 119-2, at AB-MC 668. This statement was published during the Super Bowl and was repeated in the Wall Street Journal.

31. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

D. [REDACTED]

32. On February 8, 2019, Mr. Marino gave an interview with Cheddar, an on-line program, about the Super Bowl. ECF 40-23. In this interview, he stated that Bud Light was "probably" made with rice syrup. [REDACTED]
[REDACTED]

33. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

E. [REDACTED]

34. From February 4, 2019 to the present, MillerCoors has stated to consumers that AB's flavored products use high fructose corn syrup and that its products do not. MillerCoors also claims today on its website that high fructose corn syrup is something "nutritionists have called Public Health Enemy #1." Harrison Dec., Ex. 16, at MC 25327.

35. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

F. [REDACTED]

36. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

37. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

G. MillerCoors's Continued use of Corn Imagery

38. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

39. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

H. MillerCoors's Ingredient Advertising

40. MillerCoors engaged in the exact same advertising as it accuses AB of doing.

From 2014-2019, it advertised on its website that corn syrup was an “ingredient” in Miller Lite and Coors Light. [REDACTED]

[REDACTED]

41. [REDACTED]

[REDACTED]

[REDACTED]

42.

III. Amendment to Answer to Allegations Regarding Corn Syrup “In” the Beers

43. MillerCoors has alleged that corn syrup is only a fermentation aid, and specifically, that “[t]o be abundantly clear, there is no corn syrup (or HFCS) in the final glass, can, or bottle of *Miller Lite* or *Coors Light* that consumers ultimately drink.” ECF 86, ¶ 11 (emphasis in original).

44. When AB previously answered allegations such as these in July 2019, MillerCoors had not produced documents or disclosed experts, and no depositions had taken place. Thus, AB responded accurately that it lacked knowledge or information sufficient to form a belief as to the truth of such allegations. E.g., ECF 87, ¶ 11.

45. [REDACTED]

[REDACTED]

[REDACTED]

a. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

b. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

c. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

d. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

e. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

f. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

g. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

h. [REDACTED]

[REDACTED]

[REDACTED]

i. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

j. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

k. AB has expert testimony as well demonstrating that corn syrup is in the final product. Harrison Dec., Ex. 24, ¶¶ 45-60; Harrison Dec., Ex. 25, ¶¶ 32-65.

46. For these and other reasons, AB requests leave to amend its answer to deny the allegation that there is no corn syrup in the final product and to assert the repeated statements by MillerCoors that are contradicted by the evidence above as further support for the unclean hands defense.

* * *

WHEREFORE, AB respectfully requests that leave be granted under Rule 15(a)(2) to permit AB to file an Amended Answer to MillerCoors's First Amended Complaint and Counterclaim. AB's proposed Amended Answer and Counterclaim has been simultaneously filed with this motion.

Dated: October 17, 2019

Respectfully submitted,

GODFREY & KAHN, S.C.

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